the idea of reciprocity as a measure for justice or policy, and the obstacle to a complete assimilation of the rights of alien and native born, no longer a mere dream, is not to be found in the theories of jurists, but in the great and dangerous forces of national jealousy and economic selfishness. We can not forget that these forces are inextricably bound up with the instinct of national self-preservation, but enlightened and progressive legal theory will persistently and constantly struggle against their more extreme manifestations as embodied in legislation, with an abiding faith that the principles of justice can be ascertained, that a measure of generosity is a condition of putting these principles in practice, and that only in justice done with generosity is there ultimate profit to either party. In the meantime, and till the golden age returns, a *quid pro quo* is dear to the heart of the statesman, and the system of conventions and reciprocal concessions is, in many directions, ameliorating conditions of friction and depriving international competition of its most dangerous weapons.

The CHAIRMAN. We thank Mr. Coudert for his evident assimilation of the very clear and lucid argument of Mr. Barclay.

The next upon the program is the subject of "The admission and restrictions upon the admission of aliens." You will first listen to an address by Honorable Charles Earl.

ADDRESS OF HONORABLE CHARLES EARL, SOLICITOR FOR THE DEPARTMENT OF COMMERCE AND LABOR,

ON

Admission and Restrictions upon the Admission of Aliens.

The right of any nation to deny admission to aliens is necessarily opposed to such rights as aliens themselves possess as individuals to journey where they will, and to such rights also as other states possess, whether founded on general consent or express agreement, to assure for their citizens or subjects the freedom to enter and reside in the territory of friendly Powers.

A discussion, therefore, of the topic I am dealing with may take a wide range. To treat it adequately would require a greater degree of learning and ability, and better opportunities for preparation, than I have been able to command. My personal contribution to the discussion must accordingly be confined to a statement of the attitude and conduct of the United States with regard to the admission and exclusion of aliens, and to a consideration of certain contrasts in the matter of legal doctrine immediately suggested thereby.

At the present time twenty-six separate classes of aliens are, by express legislation, excluded from admission into the United States. Legislation to this end began in 1875, and successive enactments have manifested a clear purpose of increasing the number of excluded classes, or of making more certain the exclusion of the classes already proscribed.[1] On the other hand, while the propriety of enacting further restrictive measures continues to occupy the attention of the lawmakers and others, it must be said that, as to all aliens not embraced within any of the classes specifically excluded, no hindrance is placed in the way of admission, except that, to insure the rejection of some, all aliens may be required to submit to interrogation or examination. Thus far, except as to specifically defined classes, immigration generally to the United States is unrestricted, if not encouraged. The classes of aliens specifically excluded, however, include persons of many sorts and conditions, and are designed to keep out, and do keep out, very large numbers.

Without undertaking to name each of the several excluded classes, it may be said generally that existing laws provide for the exclusion from the United States of

(1) aliens who are physically or mentally defective;
(2) aliens contagiously diseased;
(3) alien paupers or beggars, and aliens generally who are destitute, or incapable of maintaining themselves, or likely to become a public charge;
(4) aliens deemed morally, socially, or politically unfit, as prostitutes, procurers, criminals, anarchists, and polygamists;

[1] A summary of this legislation is given in a note at the end of this paper.

(5) contract laborers, or aliens induced or solicited to migrate by offer or promise of employment;
(6) assisted aliens, or those whose passage is provided by any corporation, association, society, municipality, or foreign government;
(7) Chinese laborers; and
(8) with respect to the continental territory of the United States, Japanese and Korean laborers with limited passports.

The right of the United States thus to refuse admission to friendly aliens in time of peace was passed upon by the Supreme Court of the United States in several notable decisions, in which the court undertook to state and apply the rule of international law on the subject. In one of these decisions [2] the rule was stated as follows:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

In a later case,[3] which involved not merely the power to exclude, but the power to deport or expel, the rule was stated even more emphatically:

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same ground, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. * * *

The right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right * * * is consistent with the Constitution. * * *

The power to exclude aliens and the power to expel them rests upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

[2] 142 U. S. 659.
[3] 149 U. S. 711.

The leading case on this subject, however, in the United States, is *The Chinese Exclusion Case,*[4] decided in 1889, which arose in this way: the alien concerned, a Chinese laborer who had resided in the United States for about twelve years, and who had in June, 1887, left for a visit to China, was denied admission upon his return to the country in September, 1888. Prior to his departure, the Act suspending for ten years the coming of Chinese laborers to the United States had been enacted, but not only was there no law prohibiting the re-entry of Chinese laborers who were already residing in the United States, but express provision was made by law for the issuance of certificates for the identification of such resident laborers who might wish to go abroad and subsequently return, and the statutes provided that such certificate should entitle the holder "to return to and reenter the United States." The particular laborer in question had been furnished with such a certificate. After his departure, and before his return, October 1, 1888, new legislation was had prohibiting the issue of such certificates in the future, declaring void every such certificate previously issued, and making it unlawful for any resident Chinese laborer who had departed, or who might thereafter depart, from the United States to return.[5] By the Treaty of 1868, between the United States and China, both governments had recognized "the mutual advantage of the free migration and immigration of their citizens and subjects respectively from the one country to the other for the purpose of curiosity, of trade, or as permanent residents," and it was provided that "Chinese subjects visiting or residing in the United States (should) enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." Before the enactment of any restrictive legislation, however, a supplementary treaty had been concluded in 1880, whereby the Government of China agreed that the United States might "regulate, limit, or suspend, such coming or residence (of Chinese laborers), but might not absolutely prohibit it." The exclusion of this alien, therefore, involved the right to deny admission, not only to an alien newly arriving in the United States, but to one who had previously resided therein, and

[4] 130 U. S. 605.

[5] 25 Stat. 504.

as to whom it could be claimed that the law authorizing his exclusion deprived him of a right vested under a treaty as a law of the land and the statutes passed in execution of it. The right to exclude was sustained. That the Government of the United States, through the action of the legislative department, could exclude aliens from its territory was a proposition which was deemed not open to controversy. Said the court:

The jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * * To preserve its independence, give security against foreign aggression and encroachment is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression or encroachment come. * * * The government possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; * * * The power is constantly exercised; its existence is involved in the right of self-preservation. * * *

That the Act of 1888 was in contravention of express stipulations of the Treaty of 1868, and of the supplemental treaty of 1880, the court conceded, but held that it was not on that account invalid, or to be restricted in its enforcement. First observing that treaties and laws were alike declared by the Constitution to be the supreme law of the land, that no paramount authority is given to one over the other, and that so far as their relative obligation as municipal laws is concerned, the last expression of the sovereign will must control, the court went on to say that the power of exclusion of foreigners being an incident of sovereignty,

the right to its exercise at any time when, in the judgment of the government the interests of the country require it, can not be granted away, or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other person. They can not be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract.

Accordingly, it was further stated that if there existed any just ground of complaint on the part of China, it must be made to the political department of the government; that the continued suspension of the exercise of a governmental power, where by the favor and consent of the government it had not previously been exerted with respect to a certain class, was not a right or interest so vested that it could not be destroyed or impaired by the expiration or abrogation of a treaty; and that the only remedy open to China, if it was dissatisfied with the action taken, was to " make complaint to the executive head of our government, or resort to any measure, which, in its judgment, its interests or dignity may demand."

Notwithstanding the unqualified terms in which the doctrine relative to the exclusion of aliens is stated in these decisions, the rule as stated seems to be fully supported by the recognized authorities on public law. The authorities cited by the Supreme Court, in addition to numerous passages from the diplomatic correspondence of the United States, were Vattel, Phillimore, Ortolan and Bar. Other authorities to the same effect are collected in a report prepared by Mr. Foster, Secretary of State, for transmission to the Senate, January 7, 1893.[6]

With a view of ascertaining whether this sovereign power of exclusion is subject to any limitations, and, if not, with a view of emphasizing the completeness of the power, it will be worth while to refer, by way of contrast, to certain official acts and declarations on the part of the United States of very different import.

By the Treaty of 1868 between the United States and China, the high contracting parties formally recognized, not merely " the mutual advantage of free migration and immigration," but " the inherent and inalienable right of man to change his home and allegiance." On the part of China, such a declaration involved a new conception, in view of the isolation and seclusion of her historic position among nations. On the part of the United States, it was the expression of what had been the national attitude and policy from the beginning. It was in harmony with a familiar process of the country's growth,

[6] 4 Moore Dig. Int. Law, 153.

with its uniform practice in regard to immigration and naturalization, with its position respecting expatriation, and with the received notion among its people concerning individual liberty

With regard to immigration, for example, it will be recalled that no measures were taken for the exclusion even of alien criminals and prostitutes until 1875, and that it was not until the Act of 1882 had been followed by the Act of 1891 — whereby the national government assumed control of the matter in lieu of the divided control between State and nation which had obtained under the earlier Act — that anything like a comprehensive law was passed for the regulation of immigration. On the other hand, as late as 1864, at the instance of President Lincoln,[7] Congress passed an Act [8] for the express purpose of promoting immigration, which provided for the appointment of a Commissioner of Immigration to be under the direction of the Secretary of State, declared that all contracts made by emigrants in foreign countries whereby they pledged their wages to repay the expense of emigration should be valid, and created an office in New York, charged with arranging for the transportation of immigrants to their final destination and protecting them from imposition and fraud.[9] The occasion of this law was the great need of labor, then existing, created by the draft made upon the working classes by the Civil War, and arising from the necessity of rebuilding the industries of the country; but the policy of the law was founded upon an unbroken tradition. The constitution of Alabama declares that immigration shall be encouraged; in Maryland, there is, by the constitution, a Commissioner of Immigration, and in North Carolina, Virginia, Washington, and Idaho, a department of immigration; by the Delaware constitution, immigration is to be encouraged by the Board of Agriculture; and the constitutions of Florida, Kentucky, and other States provide for a Commissioner of Immigration, Labor and Statistics.[10] In the legislative enactments of the several States, no less than in their constitutional provisions, evidence of the same policy

[7] Message, Dec. 8, 1863.
[8] 15 Stat. 385.
[9] Act of July 4, 1864; 15 Stat. 385.
[10] Stimson, Fed. & State Consts., III, 66, 202.

is observable. Indeed, it is a rather striking fact that so many States should have passed laws expressly designed to encourage immigration within recent years. Such laws were passed by the States of Delaware, New Hampshire, New Mexico, North Carolina, North Dakota, Wisconsin and Wyoming in 1905; by Kentucky, Mississippi and Virgnia in 1906; by Alabama, Colorado, Delaware, Minnesota, Nevada, South Dakota and Tennessee in 1907; by Louisiana, Maryland, New York and Virginia in 1908; and by Missouri and possibly other States in 1909.[11] "To encourage foreign immigration," said Mr. Justice McLean, speaking in 1849, "was a cherished policy of our government at the time the Constitution was adopted."[12] Mr. Hay, as Secretary of State, writing in 1902, said:[13]

The United States welcomes now, as it has welcomed from the foundation of its government, the voluntary immigation of all aliens coming hither under conditions fitting them to become merged in the body politic of this land. * * * The pauper, the criminal, the contagiously or incurably diseased are excluded from the benefits of immigration only when they are likely to become a source of danger or a burden upon the community.

The essential conditions of naturalization in the United States, in addition to the renunciation of former allegiance and the oath of new allegiance, are: a residence of five years, and proof of good moral character, of attachment to the principles of the Constitution, of being well disposed to the good order and happiness of the same, and of ability to speak the English language.[14] Any alien, not an anarchist or a polygamist, being a free white person, or person of African nativity or descent, may be naturalized.[15] Earlier laws were even more liberal.[16] "Under these laws," it has been said, "have been admitted such numbers, that they and their descendants constitute a great part of our population. * * * From the first day of our

[11] N. Y. State Lib., Yearbook Legislation, 1905, and succeeding years; Mo. Laws, 1909, 550.

[12] 7 How. 401.

[13] 4 Moore Dig. Int. Law, 151.

[14] Act of June 29, 1906.

[15] Sec. 2169, R. S.; Act of June 29, 1906.

[16] H. Doc. 59 Cong., 2d sess., No. 326.

separate existence to this time has the policy of drawing hither aliens, to the end of becoming citizens, been a favorite policy of the United States; it has been cherished by Congress with rare steadiness and vigor." [17]

The right of expatriation is declared by a law of the United States to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and any determination to the contrary is declared to be "inconsistent with the fundamental principles of the Republic." [18] Prior to this enactment, views differed as to how far the consent of the parent state was necessary to the exercise of this right, but the right itself was always asserted.[19] Thus, the views of Attorney-General Cushing, who occupied a middle ground, expressed in 1856, may be summed up in the following phrases:

The doctrine of absolute and perpetual allegiance — the root of the denial of any right of emigration — is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union. * * * As a question of natural right, emigration belongs to the general category of those elements of individual happiness, which every citizen is entitled to pursue, but in subordination, always, to the general welfare. * * * The right of expatriation, under fit circumstances of time and manner, * * * must be considered * * * part of the fundamental public law of the United States. * * * Expatriation is a general right, subject to regulation of time and circumstances according to public interests; and the requisite consent of the state assumed where not negatived by standing prohibitions.[20]

The views of Attorney-General Black, expressed three years later, were uncompromising:

The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place — the general right, in one word, of expatriation, is incontestable. * * *

[17] 7 How. 440.

[18] Act of July 27, 1868; Sec. 1999. R. S.

[19] 3 Moore, Dig. Int. Law, 552 *et seq.;* 143 U. S. 161; 169 U. S. 711.

[20] 8 Op. Atty-Gen. 162.

Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world. Upon the faith of that pledge millions of persons have staked their most important interests. If we repudiate it now, or spare one atom of the power which may be necessary to redeem it, we shall be guilty of perfidy so gross that no American can witness it without a feeling of intolerable shame. * * * The Hanoverian Government can not justify the arrest of Mr. Ernst by showing that he emigrated contrary to the laws of that country, unless it can also be proved that the original right of expatriation depends on the consent of the natural sovereign. This last proposition no man can establish.[21]

The language of the Declaration of Independence is that all men "are endowed by their Creator with certain inalienable rights," and that, "among these are life, liberty and the pursuit of happiness." Something of what is meant by these words may be inferred from the fact that one of the charges brought by that instrument against the British sovereign was that "he has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands."[22] The words of Magna Charta (c. 42), "in future any one may leave the Kingdom and return at will," as perpetuated in the Massachusetts Body of Liberties of 1641, read: "Every man of or within this jurisdiction shall have free liberty, notwithstanding any civil power, to remove both himself and his family, at their pleasure, out of the same." In six States — Alabama, Indiana, Kentucky, Oregon, Pennsylvania and Vermont — the constitutions provide that all persons shall have the right to emigrate from the State, or that they have a right to emigrate from one State to another.[23] The right of personal liberty, says Professor Stimson, in his work

[21] 9 Op. Atty.-Gen. 357.

[22] 7 How. 440.

[23] Stimson, Fed. & State Consts., III, Sec. 65.

on the *Federal and State Constitutions of the United States,* referring to the idea of liberty derived from the fundamental documents of the English people, includes, in addition to the right to life, "the right to liberty of the person, that is, freedom of bodily restraint either by imprisonment, detention, or the being refused locomotion to any place desired, even to the extent of leaving the Kingdom;" and he adds that "the right to have one's person free of arrest, detention, or control applies as well to the government, the actions of officers of the courts of law, as to the trespass of any fellow citizen." [24] And in the definition given by our Supreme Court, liberty is said to embrace the right of the citizen "to live and work where he will." [25]

From these brief references to doctrines characteristic of America, it will be seen that, so far as individuals are concerned, government and people in the United States have held that the right of personal liberty belongs to all men, citizens and aliens alike; that this right includes the right to emigrate and to change home and allegiance; that these rights are inalienable and, therefore, not rightfully susceptible of being wholly denied. Naturalization implies expatriation, and expatriation in turn includes naturalization in the country of adoption as well as emigration out of the country of origin, while emigration is but one part or stage of a process which is completed by immigration. The right to leave one country implies the right to enter another. The personal liberty of the individual, considered as a natural right, is no less infringed by his exclusion from a foreign country than by his detention in his own. Of course, these rights are not absolute, and in every assertion or definition of them, certain limitations are implied. Like all personal rights, they are conditioned by duties, by the equivalent rights of others and by the rights of the state.[26] The right of individual aliens, therefore, to enter and reside in a foreign state can not, for example, be superior to the right of the individual citizens of that state to claim that the advantages they enjoy as members shall not be jeopardized by the admission of outsiders, and must be limited by the right and duty of such state to

[24] *Ibid,* p. 18.
[25] 165 U. S. 589.
[26] 137 U. S. 89; 197 U. S. 29.

preserve its institutions for the benefit primarily of its own citizens, and "to prevent the rights of access and intercourse from being used to its injury." To quote again words of Attorney-General Cushing: [27]

The assumption of a natural right of emigration, without possible restriction in law, can be defended only by maintaining that each individual has all possible rights against the society, and the society none with respect to the individual; that there is no social organization, but a mere anarchy of elements, each wholly independent of the other, and no otherwise consociated save than by their casual co-existence in the same territory.

However, let the limitations upon these rights be what they may; after such limitations have been allowed, an important residuum must remain, if the rights in question have any validity at all, and if they amount to anything more than mere abstractions. But how shall the individual avail himself of these rights, if the country of his nativity refuses him permission to leave, or if the country to which he would go declines to receive him? The question here is whether the law of nations recognizes any rights on the part of individuals, such as have been asserted in the United States, which can prevail against the general right of a sovereign state to exclude aliens from its dominion, or whether this general right of exclusion is subject to any restraints, imposed by the law of nations, as to the manner of its exercise or otherwise, by reason of any private rights of the individuals concerned.

Conceding the existence of a right on the part of aliens, as individuals, to enter and reside in countries other than their own, and conceding that, in some countries at least, such right is recognized as an incident to personal liberty, it is believed, nevertheless, that the existing machinery of international law affords no means by which it can be vindicated.

Individuals are not international persons.[28] "States are the proper, primary, and immediate subjects of international law." [29]

[27] 8 Op. Atty.-Gen. 163.
[28] Taylor, 171.
[29] Phillimore, Vol. 1, p. 79.

Questions may be raised concerning the persons and property of private individuals, "but mediately and indirectly, and in so far only, as they are members * * * of states."[30]

It is through the medium of this nationality only that individuals can enjoy benefits from the existence of the law of nations. * * * If individuals who possess nationality are wronged abroad, it is their home state only and exclusively which has a right to ask redress, and these individuals themselves have no such right. * * * Individuals enjoy benefits from this law not as human beings, but as subjects of such states as are members of the family of nations.[31]

Describing what the law of nations really does concerning individuals, Oppenheim says: "Every state has by the law of nations a right to demand that its * * * citizens be granted certain rights by foreign states * * *." And the law of nations "imposes the duty upon all the members of the family of nations to grant * * * certain rights to such foreign citizens * * *." Such rights, when granted, however, are said to be, not international rights, but rights derived from municipal law, since, until granted by single states pursuant to international duty, they have no actual existence.[32]

Not only must the rights of individuals, as objects of international law, be secured, if at all, through the agency of the state to which they belong, but such rights only can be demanded which are referable to some right which the state on its part is authorized to assert in respect of its citizens or subjects. The right on the state's part to which the individual right of admission into foreign territory has been referred is the alleged right of intercourse;[33] and this appears to be no right at all.[34] Hall considers that, in the last resort, a right of intercourse would involve "a right taking priority of the rights of independence and property." "Of the working of such a right," he says, "if it existed, there would be deep traces in both law and history;" and he finds that, in law, no definite usages are to be referred to it, and that the evidence of history is still less favorable;

[30] *Ibid;* Hall, p. 51.
[31] Oppenheim, 1, Sec. 291.
[32] Oppenheim, 1, 289.
[33] Taylor, 1, 186; Oppenheim, 1, 141–142.
[34] Woolsey, Sec. 25; Oppenheim, 1, 141–142.

whereas, " if so wide-reaching a right had been admitted at all as an operative rule of law, the occasions for its employment adversely to foreign states would neither have been few nor insignificant." [35]

Even if a state's right of intercourse sufficed to secure the individual's right of admission into foreign territory, there would still be lacking a sufficient motive for granting state aid to those subjects whose purpose in going abroad involved a severance of their existing allegiance. As observed by Secretary Foster: [36]

Every government naturally desires to secure for its citizens or subjects who intend to preserve their allegiance and their homes as full rights as possible of travel or temporary residence abroad; but there is no reason why an immigrant-receiving country should bind itself to receive immigration, and much less so why an immigrant-furnishing country should desire such a compact. Even the governments of those countries in which the individual right of expatriation is fully admitted and no obstacles are put in the way of emigration would scarcely be solicitous of securing a conventional right for their people to abandon their country and make permanent homes elsewhere.

Must it be said, then, that the law of nations takes no account of any rights of aliens, as individuals, to be received into the body of states other than their own, and imposes no limitation whatever upon the right of independent states to exclude any and all aliens at discretion? Theoretically, doubtless, this is the law. But whether such a doctrine is fully justified, either by the general sense of what ought to be the law, or by the way in which civilized states are for the most part accustomed to act, in other words, by present usage, it seems to me is open to question.

The power of exclusion is a necessary consequence of sovereignty and independence, and is based on the fundamental right of self-preservation.[37] Whenever, therefore, the peace, the welfare, the security or the independence of a country would be injured by the admission of aliens, the power of exclusion may and must be exer-

[35] Page 56.

[36] Report of Mr. Foster, Secretary of State, to the President, Jan. 7, 1893; 4 Moore, Dig. Int. Law, 155.

[37] 142 U. S. 659; 149 U. S. 711.

cised. Whether the danger of such injury exists, however, is a question of fact, though a question of which each country is the best judge in its own case, and which every country necessarily decides for itself. Is such decision final? It is clearly final in the sense that the exercise of the power of exclusion can not be restrained. But the decision may be obviously wrong; the fact may be clearly otherwise; and exclusion in the particular instance may be arbitrary, oppressive and unjust. As said by Mr. Marcy,[38] "it may always be questionable whether a resort to this power is warranted by the circumstances." Questionable in what way, and by whom? As a matter of academic discussion, or by other states? No state can be compelled to open its door to the citizens of another state,[39] but its power of refusing hospitality is "subject * * * to such retaliatory measures as an abuse of the excluding or expelling power may provoke." [40] No question is ever made concerning the rightfulness of excluding aliens in certain cases. Thus, says Hall,

if a country decides that certain classes of foreigners are dangerous to its tranquility, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons, its conduct affords no ground for complaint. Its fears may be idle; its legislation may be harsh; but its action is equal.[41]

But in other cases, the matter is different. To quote Hall again:

For a state to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples; to exclude any without reasonable or at least plausable cause is regarded as so vexatious and oppressive, that a government is thought to have the right of interfering in favor of its subjects in cases where sufficient cause does not in its judgment exist.[42]

Referring to a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on condition of depositing $1,000, Mr. Frelinghuysen said that there would seem to be no good reason

[38] Mr. Marcy to Mr. Fay. Mar. 22. 1856; 4 Moore. Dig. Int. Law. 72.
[39] Oppenheim, 1, 314.
[40] Taylor, 231.
[41] Hall, 212.
[42] Hall, 211.

why a negro resorting to the island and having a passport as evidence of his identity and the lawfulness of his purpose should be met by a practically prohibitive measure, such as that of depositing an excessive sum as a guaranty. He added that the Department of State was not aware that any such requirement had ever been demanded of an American citizen resorting to Cuba, and that if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by treaty, or recognized under the amended Constitution." [43] I am unable to specify what instances of exclusion, if any, have been regarded as so oppressive or unjust as to warrant interference. It has been suggested that "if a state excluded *all* subjects of one state only, this would constitute an unfriendly act against which retorsion would be admissible," [44] and that "in the absence of a state of war, the *expulsion* in mass of *all* foreigners belonging to one or more definite nationalities cannot be justified except as a measure of reprisal." [45] It is not asserted that this is now the law. The statement is quoted because more than one publicists has said that "it ought to be the law." [46]

The power of a country to refuse the hospitality of its soil to any and all foreigners at discretion is conceded, therefore, only as a matter of strict law. The exercise of the power, says Hall,[47] "is necessarily tempered by the facts of modern civilization." And even if, as a matter of strict legal doctrine, the law of nations imposes no limitations upon the power, that same law would seem to recognize, as partaking of the nature of legal injuries, certain possible exertions thereof, justifying remonstrance and measures of reprisal or retaliation, if nothing more, on the part of an offended state. In a system of jurisprudence which concedes an unlimited right and recognizes, however slightly, that an actionable wrong may result from the unlimited exertion of that right, is there not room for some adjustments?

It is established by weighty testimony that a right of intercourse among nations does not exist under the law of nations, yet it is

[43] 4 Moore, Dig. Int. Law, 109.
[44] Oppenheim, 1, 314.
[45] M. Rolin-Jaequemyns, Rev. de Droit Int., 20, 498.
[46] Taylor, 186; Hall, 212.
[47] Hall, 211.

acknowledged that, but for international intercourse, there would be no law of nations, and that the effect of a denial of all intercourse is to withdraw a state from the family of nations and from the pale of international law.[48] Practically, "nations must have intercourse with each other." [49] "Varied intercourse with other states is a necessity for every civilized state." [50] Woolsey says: [51]

There is a difficulty in the theory of international law, arising from the weakness of the claim which one state has to intercourse with another, compared with the immense and fundamental importance of intercourse itself. There can be no law of nations, no civilization, no *world,* without it, but only separate atoms; and yet we can not punish, it is held, the refusal of intercourse, as a wrong done to us, by force of arms, but can only retaliate by similar conduct. * * * To put intercourse on the ground of comity or even of duty, fails to satisfy me.

And he adds: "the feeling that there is a certain right for lawful commerce to go everywhere is in advance of the doctrine of strict right which the law of nations lays down." Hall says that "the interest which every country has in trade prevents the questions from arising which might be produced by a total or almost complete seclusion." [52] May it not be thought that if and when these questions do arise a solution will be found, and accepted, capable of bringing legal theory into closer harmony with the necessities of civilized life?

Signs are not altogether wanting of a tendency toward the development of international legal doctrine in the direction indicated. So influential a body as the Institute of International Law has adopted, and proposed for international observance, a series of rules on the admission and expulsion of aliens, which were expressly based on the consideration

that humanity and justice recognize that, within the limits of their own security, states shall not exercise this right without due regard to the rights and liberty of aliens who either desire to enter said territory or are already therein.[53]

[48] Woolsey, 63; Oppenheim, 1, 141; Hall, 56, 211.
[49] Taylor, 198.
[50] Oppenheim, 1, 141.
[51] Woolsey, 64.
[52] Hall, 56.
[53] Annuaire, Inst. de Droit Int., 12, 219.

Among the more important of these rules may be mentioned:

Art. 6. The free entry of aliens in the territory of a civilized State may not be prohibited in a general and permanent manner except for the public good and for serious motives (de l'interet public et de motifs extremement graves), for example, by reason of a fundamental difference in manners and civilization, or by reason of a dangerous organization or accumulation of aliens demanding entrance in mass.

* * * * * * *

Art. 9. Each State should fix by laws or regulations published a sufficient time before their going into effect, rules governing the admission or movement of aliens.

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Art. 12. Admission may be refused to any alien in a condition of vagabondage or mendicancy, or who may be suffering from a disease constituting a menace to public health, or who is strongly suspected of grave infractions of law committed abroad against the lives or security of individuals or against public property or faith, as well as to such aliens as may have been convicted of such infractions.

Here are principles of conduct which appeal to mind and conscience alike. Exclusion regulated by definite laws, previously enacted and announced; the state's right of self-preservation fully conceded, but its measures of protection required to bear some evident relation to that right; the private right of the individual to personal liberty also recognized, but limited by the equivalent rights of fellow men and by the rights of the state; categories of aliens specifically defined which a state may with full justification exclude, — these principles represent enlightened views. It is true that they are without the sanction which may be invoked for a violation of rights recognized by international law, and that "no government wishing to do a harsh act would find its hands much fettered" thereby.[54] But no nation professing a regard for individual liberty, wishing to merit the good will of friendly peoples, and anxious to preserve its self-respect, can afford altogether to ignore them. And who shall say that, in the process of development, which we are told is always going on in the field of jurisprudence, these principles, or others like them,

[54] Hall, 212.

will not eventually find a place in the legal system governing the intercourse of nations?

And now, Gentlemen, that I have ended my remarks, I marvel at my temerity in venturing to address you, considering the nature of the topic in hand and how poor an equipment I could bring to its consideration. I have been contrasting two rights, which seem to move in different spheres, — a right of the state which finds its sanction in the law of nations, and a right of the individual which is apparently confined to the domain of municipal law or to the field of speculation. I am more than afraid that I shall be convicted of traveling in a circle and of parading a paradox. By way of excuse, I can only say that the paradox is not of my making. The sovereign right of the state is established by universal testimony. The right of the individual is embeded in the charters and traditions of many countries, including our own. If the law of nations is incapable of reconciling the one with the other, it is not apparent how the right of the individual can ever "acquire validity and coerciveness," when opposed by the right of any state but his own. If the law of nations can not take jurisdiction, there is no institution that can. And since the state exists for man, not man for the state, it can not be out of place to bring forward the rights of man, as a human being, even in a forum professing to deal only with the relations of states between themselves. Such rights are entitled to be heard, though the forum may be powerless to protect them.

Note.

The first statute operating in any way to restrict immigration into the United States was the Act prohibiting coolie trade, passed in 1862.[55] This Act was directed solely against those engaged in the prohibited trade. The primary object of the Act was not to restrict immigration, and it was accordingly provided that it should not apply "to any voluntary emigration of the subjects specified." This statute belongs in the same class with earlier laws prohibiting the slave trade.[56] In 1875, however, an Act was passed specifically for-

[55] 12 Stat. 340; 18 Stat. 477.
[56] 3 Stat. 601.

bidding the entrance of aliens of certain classes, which was the first of its kind.[57] Two classes were excluded by this Act: aliens convicted of felonious crimes, other than political, whose sentence had been remitted on condition of their emigration, and women imported for the purposes of prostitution. The first Act for the general regulation of alien immigration was passed in 1882.[58] It provided that "any convict, lunatic, idiot, or any person unable to care for himself or herself without becoming a public charge," should not be permitted to land; and it imposed a duty of fifty cents (since increased to $4), payable on account of each alien coming within the United States, the money thus collected to be used for the relief of aliens falling into distress, or needing public aid, and in defraying the expense of administration. In 1885, a special Act was passed, prohibiting the importation or migration of aliens under contract to perform labor in the United States.[59] It did not in terms exclude aliens so imported until amended in 1887.[60] The general immigration Act of 1882 and the original contract labor law of 1885 have been successively amended, more particularly by the Acts of 1888, 1891, 1893, 1894, 1903, 1907 and 1910.[61] Other excluded classes have been added and the means of enforcement have been greatly strengthened. Legislation for the exclusion of Chinese laborers also began in 1882, but has been dealt with in statutes quite distinct from statutes regulating the immigration of aliens generally. Japanese and Korean laborers, on the other hand, are excluded, though not in terms, under the general immigration Act of 1907.

Japanese and Korean laborers are excluded from the continental territory of the United States only, and such exclusion is accomplished by virtue of a provision pursuant to which, whenever the President is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States, or to any insular port of the United States, or to the Canal Zone, are

[57] 18 Stat. 477.
[58] 22 State. 214.
[59] 23 Stat. 332.
[60] 24 Stat. 415.
[61] 25 Stat. 566; 26 Stat. 1084; 27 Stat. 569; 28 Stat. 390; 32 Stat. 1263; 34 Stat. 898; 36 Stat. 263.

being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, he may refuse to permit such holders to enter such continental territory from such other country, or insular possession, or Zone. Under the authority thus conferred, by Executive Order of March 14, 1907, the President has directed the exclusion of Japanese and Korean laborers, skilled or unskilled, who have received passports to go to Mexico, Canada, or Hawaii, and who come therefrom to the continental territory of the United States. In consequence of an informal understanding between the United States and Japan, the latter government will not issue passports to Japanese or Korean laborers to go directly to the continental territory of the United States.

The first Chinese exclusion Act, which became a law in 1882,[62] declared that, until the expiration of ten years, "the coming of Chinese laborers to the United States, be, and the same is hereby suspended." It did not apply to Chinese laborers who were in the country November 17, 1880, the date on which the treaty with China had been concluded, whereby it was agreed that the United States might "regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it;" and in order to identify such resident laborers who might wish to go abroad and subsequently return, provision was made for the issuance of a certificate at the time of departure, which should entitle the holder "to return to and reenter the United States." By an amendatory Act passed in 1884,[63] it was provided that Chinese persons, other than laborers, entitled to come within the United States, must first obtain the permission of, and be identified as so entitled by, the Chinese or other government of which they were subjects, which permission or identification should be evidenced by a certificate issued by such government, and visaed by a diplomatic or consular officer of the United States at the place of departure, such certificate to constitute "the sole evidence" permissible to establish a right of entry. In 1888, an Act was passed revoking the permission granted by the original Chinese exclusion

[62] 22 Stat. 58.
[63] 23 Stat. 115.

law, whereby Chinese laborers domiciled in the United States might depart and return, prohibiting the further issuance of certificates of identity to such aliens, and making void all such certificates previously issued and outstanding.[64] This Act was in conflict with the treaties with China of 1868 and 1880. It ceased to be a law upon the conclusion of the later treaty of 1894.[65] In 1892, an Act was passed continuing in force, for a further period of ten years, the laws then in effect prohibiting or regulating the coming of Chinese, and was occasioned by the expiration of the ten-year period during which, by the original Act, the coming of Chinese laborers had been suspended.[66] In 1902, as in 1892, an Act was passed in view of the lapsing of the ten-year period of exclusion previously established, and provided that all laws then in force touching Chinese exclusion " be reenacted, extended, and continued, so far as the same are not inconsistent with treaty obligations, until otherwise provided by law.[67] By treaty of December 8, 1894, China consented to the absolute exclusion of Chinese laborers (never before in the United States), for the period of ten years from the date of the convention, and for a further period of ten years unless either party should give notice of the termination of the treaty before the expiration of the first period. China having given such notice, and the treaty being about to terminate in the following December, an Act was passed April 27, 1904, amending the Act of 1902, by providing that the Chinese exclusion laws thereby extended should be reenacted and continued " without modification, limitation, or condition," and without mention of treaty obligations. The Attorney-General has held that the effect of the expiration of the Treaty of 1894 was to revive the Treaty of 1868 and the supplemental treaty of 1880, whereby it was agreed that the coming of Chinese laborers might be suspended but not absolutely prohibited.[68]

[64] 25 Stat. 504.
[65] 21 Op. Atty.-Gen. 28.
[66] 27 Stat. 25.
[67] 32 Stat. 176.
[68] 25 Op. Atty.-Gen. 137.

The CHAIRMAN. The next paper on this subject will be read by Mr. Theodore Marburg.

ADDRESS OF THEODORE MARBURG, ESQ., OF BALTIMORE, MD.,

ON

Admission and Restrictions upon the Admission of Aliens.

Mr. MARBURG. Mr. Chairman, Ladies and Gentlemen: Mr. Earl has dealt fully and clearly with the question of right as established by international practice and international law and it would hardly serve a useful purpose to multiply precedent.

There seems to be no question of the inherent, absolute, positive right of the state to restrict immigration. It might be useful, however, to read a short passage from the message of President Cleveland of October 1, 1888. It will be remembered that the Chinese Ambassador had reached an agreement with the American Government on the subject of the exclusion from the United States of Chinese laborers; that, ignoring the fact that China had failed to ratify the treaty, our Congress saw fit to legislate in the spirit of that treaty; and that President Cleveland signed the bill after he had been notified of China's explicit refusal to ratify the treaty. In other words, while international comity may dictate the making of a treaty before the people of a given country are prohibited from migrating to another country, international law and international practice do not demand it.

President Cleveland's words were these, and I presume he spoke with the full approval of his cabinet and of his law officers:

> The admitted and paramount right and duty of every government to exclude from its borders all elements of foreign population which for any reason retard its prosperity or are detrimental to the moral and physical health of its people, must be regarded as a recognized canon of international law and intercourse.

When we talk of right under international law and international practice it is something definite; but the appeal by Mr. Earl to natural rights leads nowhere. The modern tendency is to abandon the theory of natural rights and make a direct appeal to social ex-

pediency, by which is meant the welfare not only of the nation but of the race in the long result.

I shall take the liberty — I already have the permission of the chairman of the Programme Committee — to deal with the question before us principally from the side of the public welfare.

Some thirty years ago I happened to be in the Far West and was impressed with the fact that there were no poor there. Few men in that region had accumulated great riches, but there was an utter absence of the class conducting an unequal struggle with poverty.

In the more thickly settled Eastern States this class had long since appeared; and across the water in the crowded countries of Europe it had for generations paraded itself at every turn, taking away much of the charm of the cultured surroundings and mixing something bitter in his cup of joy for the thoughtful traveller.

What was the explanation of this comparative phenomenon? It seemed to me to lie in abundance of land, abundance of good land, and land cheap enough for the average man to acquire. Wealth in all its forms means opportunity to men, but abundance of good land spells opportunity in larger measure than any other form of economic wealth. So often other forms of wealth mean opportunity only for the man who already has something. Their increase seems to do little for the very poor.

The dweller in the city who finds himself thrown out of work by change of industrial method or new invention, by business crises, or by being worsted in the struggle with his fellows, finds his condition less desperate if there is cheap and fertile land to which to turn.

Very often it is not the fault of the individual that he falls into this class. It is relative ability rather than absolute ability which controls. The veriest tramp on our streets is superior to the savage who practises canabalism; but while he has risen through his progenitors and through his environment, the whole level of society has risen. The average character and ability of men is higher. It is his comparative inferiority which causes him to be worsted. Here is a permanent fact in society, a stubborn fact that defeats all the efforts of philanthropy and discounts all the advance of invention which would otherwise abolish poverty among men.

Ask the settlement worker what it is that blocks his effort; what it is that forces him at the end of the day to drop dejected in the attitude of Rhodin's great figure of the "Thinker," and he will answer "congestion in the cities," where lessening the penalty for the worsted simply multiplies the class.

As Beecher once expressed it, "the higher the pyramid of society grows, the greater is the pressure at the base."

You may say there is plenty of good land still in this country. True; but is it any longer cheap? And what is the objective of so many of our immigrants today? Is it not the city, and is not the question of immigration therefore intimately connected with the problem of congestion? About fifteen per cent only of the Scandinavians, a larger percentage of English and Germans, and a great preponderance — from two-thirds to three-quarters — of the immigrants from Southern Europe and from Russia go into the cities. And of late years the latter constitute the bulk of our immigrants. It is of no use to try to lead them elsewhere. Once admitted to this country, any attempt to control their movements is apt to result in intolerable oppression. The Italian is invited to work on the railroads or on the land. He leaves the city for a time, but very soon drifts back to it, to the section of it where his own language is spoken, his own customs observed, and where he soon makes friends.

Few regions of the world display such an expanse of fertile soil as the United States. If it is not absorbed by increase of population, our people are bound to be diverted to it from factory and shop. And in the long run we will be a better and sturdier race if the preponderant growth of cities is checked, if fewer people are crowded into factories and a larger proportion remain on the land. The man who attains distinction in politics, in the professions, in business, and in almost every walk of life is frequently the man who has gotten the strong physique which comes of life in the open air, who has gotten the fibre of character born of the stern struggle with nature which the farmer has to conduct. It is of the highest importance to the race to maintain a healthy, prosperous farming population. Germany has consciously set her face in that direction. The

great growth in German cities, surpassing in some instances even that of American cities, reflects the general growth of population. It is not brought about at the sacrifice of the land. The agricultural products of Germany are as great as ever. Contrast that fact with conditions in England. The repeal of the corn laws, the vaunted turning point in English history, the thing which has made England supreme in manufactures and commerce, may some day prove a very costly act. It depleted the land. With the abolition of the duties on corn, duties which are maintained by the Continental countries, the farmer of England found it impossible to raise corn as against the American farmer. He then took to raising sheep, whereupon the competition of Australia with the aid of the refrigerator ship, threw him out in that direction; so that now the land is being planted with trees, with the hope of getting one or one and one-half per centum return.

To my mind, the conditions existing in a city like Manchester more nearly resemble the conditions which Dante pictured in the "Inferno" than anything on this earth. I have been through thirty miles of paved streets where, although in the country we had left brilliant sunshine, it was impossible to see the sky; where there were crowds of idle men on the streets, not loafers, but men with clean faces and white kerchiefs around their necks, laboring men thrown out of work. To what condition has England brought itself? It is unable to feed its own people except by swapping manufactures for foodstuffs. It feels instantly and acutely any world-wide depression in trade. And if the growing competition of America and of Germany should result in its being thrown out of foreign markets, the population of England must fall off from starvation and emigration, implying very great human suffering.

What use is there in multiplying population if you are going to subject vast numbers to a life in factory and mine? It is not by growth in numbers that the world is moved forward, but by growth in kind. Ever a higher a type living under conditions of greater social justice; that is an aim worth striving for.

You may say that our own country has stood for opportunity to men; that it has been a "refuge for the oppressed of the world." But

does that oppression exist in the world to-day to the extent to which it existed formerly? Our early German immigration was due to political conditions in Germany. The great majority of Germans who came here in the middle of the last century fled from conditions which liberty-loving men found intolerable. To-day the only country in which such conditions exist is Russia, and an exception might readily be made in the case of Russian immigrants.

We have a duty to ourselves, the duty of guarding the life of this republic.

The successful conduct of a democratic form of government in the United States has had a liberalizing influence on the political organization of the whole world. To-day every government of the two Americas, every government of Europe, and several Asiatic governments are modeled on the lines either of the English Government or of our own; and our example has reflected back even upon England whence we originally drew our inspiration. The spread of the franchise in England and the growth of social as well as political democracy there have been unquestionably stimulated by their successful practice here. We therefore owe it to the world to continue to make this experiment successful.

If shutting out immigrants seems unfair, it is unfair in a bigger way to permit the overcrowding which will place a strain upon our institutions.

To hasten the advent of the day when our country shall be overcrowded is to throw away the inheritance of our children and is bringing measurably nearer the grave social problems which confront Europe.

Is it fair to ourselves or to the world to subject our institutions to this strain any sooner than is absolutely necessary? Our system of local self-government makes it possible to govern what is practically an empire in extent under republican forms. But thus far the experiment has been made with a prosperous and fairly contented people. Let congestion take place, with the stress of poverty and suffering that must inevitably follow despite all our modern devices and philanthropy, and democracy must gird itself for a supreme test. The Civil War was a political test; the social test has not yet come.

It will come when we face great numbers of the disinherited with the franchise in their hands.

Men are too much inclined to read progress in terms of numbers. Unless a city has grown in population, unless more tons of steel are produced and more yards of cotton spun, few feel that the community has progressed. Wealth, while essential, is, after all, only a means to an end. That end is the high and decent life of men; and if the whole energies of a community are bent on the increase of wealth, ignoring the end, centering effort upon the means, the community is moving blindly. If we can make the living conditions in our cities better, if we can do away with congestion, if we can multiply parks, if we can give the people drinking water without the poison of typhoid, if we can abolish long hours of labor and the stupid conditions under which men live in such numbers where the atmosphere is choked with smoke, if we can upbuild the spiritual element in men and the intellectual element in men — love of music, love or art, love of literature — if we can get them to labor and create in these fields, if we can get more men to abandon the pursuit of wealth and turn their efforts in these directions, that would be progress in a nation, and this whole question ought to be considered in that light.

There is another effect which the preponderant growth of cities is having in America. We have witnessed a great increase in the cost of living. The fundamental reason of that is the great increase in the output of gold, the thing in terms of which prices are fixed. But, on comparing the rise of prices in England and in America, we find that from 1896 until April of last year the rise in England was twenty-four per cent. and in America forty-eight per cent. What explains this difference? The tariff and trusts? Hardly: they existed before the rise began. An investigation conducted by an impartial commission in Massachusetts discloses the fact that these two elements have very little to do with it; that the real explanation is found in the increase in the proportion of non-food-producing people in this country as revealed by the preponderant growth of city population. A few years ago such perishable things as garden truck and fresh fruits, the price of which is not fixed by a world market, were much cheaper here than in Europe. To-day they have come perma-

nently nearer to the European level. Wages and salaries rise very slowly as compared with prices, so there you have an additional element of suffering for congested city populations.

The land speculator, steamship and transportation interests, the men absorbed in or laying stress upon economic activity to the exclusion of higher activities, all want as many immigrants as can be induced to come to us. Some speakers and writers capitalize the earning power of each immigrant and tell us how much better off the country is for his coming.

If numbers are what constitute a truly great people and cause them to live in history, by all means persist in the present policy, because the great growth of population in the United States comes from the large families of immigrants in the first and second generations. But if there are other elements of more importance than numbers, then we may well inquire whether the tide of immigration which was so useful to us in our earlier days is now an advantage or a potential disadvantage.

We might well try, for a generation at least, the experiment of limiting immigration. The basis of *laissez faire* is the fundamental truth that the trend of history is often bigger than human understanding, just as the trend of our private lives is often bigger than our private grasp. How often it has turned out to the advantage of each of us that we were not able to do the thing we set out to do! A big political instance is the South's failure to do what it tried to do in the Civil War. But does it follow that we should neglect the intellectual process? More and more human evolution as compared with animal evolution is becoming a conscious evolution. Of late much attention is being given to eugenics; not only negative eugenics by which the imbecile is colonized and prevented from marrying, but positive eugenics — conscious breeding from the best. Starting with the idea that we want to limit the arrivals in this country irrespective of race, of character, or of physique, to, say, one-quarter of the numbers which are coming to us now, we may superimpose the policy of a careful selection which will be very practical, very sensible eugenics. We can say, "We will receive so many men from the north of Europe, so many men from the south of Europe; we

prefer immigrants from northern Italy to immigrants from southern Italy." We have an undoubted right, in the eye of international law, to do this. Receiving the hordes from European countries does not help such countries because the void is soon filled by the home increase. Moreover, an enlightened and progressive nation serves the world best by a due regard for its own interests. That, it seems to me, would be an intelligent policy for this country to adopt, supplanting the haphazard method which has characterized the treatment not only of this, but of so many other of our great public questions.

The CHAIRMAN. The next address on this subject will be by Mr. Clement L. Bouvé, of this city, and after its conclusion the subject will be thrown open to general discussion, and we will be glad to hear from any one who wishes to express views on the subject.

MR. CLEMENT L. BOUVÉ, OF WASHINGTON, D. C.,

ON

Restrictions on the Admission of Aliens.

By the treaty between the United States and China, concluded July 28, 1868, the high contracting parties recognized " the inherent and inalienable right of man to change his home and allegiance; and also the mutual advantage of free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, trade or permanent residence." Availing themselves of the opportunities of immigration afforded by the terms of the treaty, and as the result of the discovery of gold on the Pacific coast, Chinese laborers poured into California in such numbers as to render further legislation necessary in the shape of the supplementary treaty of November 17, 1880. By this treaty the government agreed " that notwithstanding the stipulation of the former treaties, the United States might regulate, legislate, or suspend the coming of Chinese laborers or their residence therein, without absolutely forbidding it whenever in their opinion the interests of the country or any part of it might require such action. * * * On the 6th of May, 1882, an Act of Congress was approved to carry

this supplemental treaty into effect." (Chae Chan Ping, 130 U. S. 581, 32 Law ed. 1068.) The Act provided that the coming of Chinese laborers to the United States be suspended between the period running from the expiration of ninety days after the passage of the Act, and the expiration of ten days next succeeding the date of such passage. It authorized the issuance by the Collector of Customs to Chinese laborers in this country at the date of the treaty and to such as might arrive here within ninety days after the passage of the Act of certificates of identification and for the presentation by Chinese other than laborers of certificates issued by the Chinese Government identifying the holders as belonging to the exempt classes.

On August 3, 1882, Congress passed an Act entitled "An Act to regulate Immigration." This Act authorized the collection of a fifty cent duty from each alien passenger who should come by steam or sail from any foreign port to any port of the United States. It prohibited the landing of any alien convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge, and provided that all foreign convicts except those convicted of political offenses should upon arrival be sent back to the nations to which they belonged.

The Act of February 26, 1885, prohibited the importation of contract laborers into the United States. Thus by provisions of these three Acts, two of which were passed within a period of four months and the third within four years after the passage of the first. Congress took steps to protect the people of the United States from what it considered three distinct evils coming from abroad: first. the presence of Chinese of the laboring class; second, the presence of all aliens afflicted with mental or moral disabilities, or such physical disabilities as might result in their becoming public charges; third, the presence of cheap and unskilled foreign contract labor. The immigration problems which confronted the legislators of 1882 and 1887 are identical in kind, if not in degree, with those which after a period of thirty years this government has had to solve. During that interval of time no less than sixteen Acts of Congress have been passed directly dealing with these questions. As yet this country has passed no law prohibiting the entrance of foreigners

into United States territory; and it would be hard to conceive circumstances under which it could do so and maintain its place in the family of civilized and enlightened nations. The policy of this government has been from the first to extend to the citizens or subjects of other Powers the privilege of ingress into its territory whether for purposes of residence or transit; and in so doing it has tacitly adopted and acceded to that general principle of international law, which clothes the alien voluntarily admitted into the jurisdiction of a foreign Power with all the rights and privileges other than those of a purely political nature which the municipal laws of the country of domicile confer on its own citizens. Nevertheless the right conferred on the alien by virtue of this principle must be deemed to be accepted by him only on the condition that every sovereign has the right to designate the circumstances under which foreigners may be admitted to or reside within its jurisdiction. Provided that these restrictions are such as a civilized nation may impose — and the nation must perforce be the judge of its own needs in this regard — and provided, perhaps, that they are announced to the world in the form of public laws, the foreigner who voluntarily submits himself to their operation can not complain of any burden which those restrictions may impose upon him. The purpose of this article is to call attention to and discuss in a very general way, how the municipal law of the United States, in the form of Acts regulating immigration and exclusion of aliens, has restricted the right of free admission into and residence in the United States to which aliens coming to this country could, under the principle of international law adverted to, justifiably lay claim.

The restrictions imposed by Congress upon aliens seeking admission into the United States may be said roughly to be subject to the three following classifications:

I. The absolute exclusion of certain classes of all aliens under the immigration Acts and of all Chinese persons belonging to the laboring class under the Chinese exclusion Acts. While this operates on the individual as a prohibition rather than as a restriction, it may properly be designated as a restriction on the exercise of the general right of all aliens to enter and partake of all the civil rights which the

municipal law of this country confers on persons within its jurisdiction.

II. Restrictions on the alien seeking admission in the matter of his right to invoke the protection of guarantees extended by the Constitution or laws of the United States. Restrictions of this kind are not to be found in the shape of positive statutory provisions set out in either the immigration or exclusion Acts, but have been held by the courts to be the necessary result of the concurrence of the two following conditions: alienage, and the status which the alien occupies as a party in deportation proceedings, where the only point at issue is the question of his right to enter or remain in the United States.

III. Restrictions as to the choice of the forum in which the alien may seek, in deportation proceedings, to establish his right to enter or remain in the United States, as well as restrictions as to the kind and sufficiency of the evidence which the alien must present in order to establish the right. These restrictions are categorically imposed by the Acts relating to the admission or exclusion of aliens.

Before passing to the discussion of these three heads in detail, it may be well to give that feature of the immigration Acts, known as the head tax, separate consideration, inasmuch as, though its imposition constitutes a restriction or condition upon the admission of aliens, it exists merely as a personal charge, and as such occupies a position distinct from the restrictions already mentioned.

The Head Tax: The tax of four dollars to be levied on account of aliens coming into the United States as provided by Section 1 of the present Act of February 20, 1907, had for its prototype the duty of the amount of fifty cents imposed by the Act of August 3, 1882, on every alien passenger coming to an American port. The original amount was doubled by the Sundry Civil Appropriation Act of August 18, 1894, and the latter was in turn doubled by the Act of March 3, 1903, where the amount of the tax was set at two dollars, at which it remained until the passage of the present Act.

The imposition of the "duty" under the Act of 1882 was assailed on constitutional grounds, but the right of the government to impose it was unqualifiedly asserted in the cases headed by *Edye* v. *Robinson*

(112 U. S. 580, 28 Law ed. 798), known as the "Head Money Cases," where the court held that in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose the contribution. It was further urged that the Act contained stipulations subversive of the articles of prior treaties, but the court, holding that a treaty is as truly a law of the land as an Act of Congress, whenever its provisions prescribe a rule by which the right of the private citizen may be determined, said "that there is nothing in such a law to make it irrepealable or unchangeable, and that it possesses no superiority over an Act of Congress, and like such an Act may be modified or repealed by subsequent Act or treaty."

The present Act provides for the levy of the head tax on account of every alien, but this sweeping classification is greatly modified by the exemptions specifically set out in the section. These exemptions are: aliens who shall enter the United States after an uninterrupted residence of at least one year immediately preceding such entrance in the Dominion of Canada, Newfoundland, the Republic of Cuba, or the Republic of Mexico; otherwise admissible residents of any possession of the United States; aliens in transit through the United States; and aliens who have been lawfully admitted to the United States and who later shall go in transit from one part of the United States to another foreign contiguous territory. A close analysis of the exemptions made shows that as they stand, an alien having at the time he seeks admission to the United States a *bona fide* residence in any possession of the United States or elsewhere is relieved from the burden of the tax. In other words, that aliens are exempt with whose entry into the United States the idea of establishing a residence in this country is not to be associated. It would seem to follow that the alien immigrant class, composed of foreigners who come to the United States after having voluntarily given up their former residence with the purpose of establishing a new one in this country, is that to which the provisions concerning the levy and collection of the head tax is applicable.

Although Section 1 of the present Act provides that the tax shall not be collected on account of aliens passing in transit through the

United States and that it shall be collected only on account of aliens otherwise not exempt who shall enter the United States, the immigration rules issued by the Secretary of Commerce and Labor, appear to provide otherwise. While Rule 2 classifies as being exempt from payment of the the tax, aliens who have not entered the United States because excluded under the Act, Rule 1 provides that "the tax collected on account of the aliens who are not permitted to land, but are held for examination by a Board of Special Inquiry * * * shall be held as a special deposit, etc." ; and Rule 41 provides that no alien purporting to pass in transit through the United States shall be permitted to land except after deposit by an officer or representative of the transportation company of the "amount of the head tax," the same to be refunded on the alien's departure from the United States within thirty days after admission. As these rules, as well as those regarding the admission of Chinese, have the effect and force of law when not inconsistent with the Acts they are intended to enforce, it is perhaps well to point out that the inconsistencies cited are inconsistencies of diction rather than of essence. The power of the Secretary of Commerce and Labor to require a deposit on account of aliens purporting to enter the United States for purposes of transit has long since been established by judicial determination. Strictly speaking, the departmental practice of requiring a deposit in cases of aliens whose claim to the right of entry has not been established or is pending before the Board of Special Inquiry, can not be sustained on the theory of self-protection, for it is hard to see what room there would be for a guarantee from the transporting companies on behalf of aliens not yet entered and still under the control of the immigration authorities. As a matter of practice, however, this arrangement seems to be satisfactory to both the government and the transportation companies, and appears to have been adopted purely as a matter of mutual convenience.

Foreign seamen landing on United States territory in pursuit of their calling are excepted, under Rule 22, from the payment of the head tax; but as was said in the case of *Taylor* v. *United States* (207 U. S.), it is of course possible for an alien sailor to land unlawfully, and when that landing is for the purpose of entering the United

States in the capacity of an alien immigrant, it would seem that the alien in so doing ceases *ipso facto* to be a sailor, is removed from the operation of the exemption clause, and liabilty to payment of the head tax on his account exists as in the case of any other alien immigrant. In the absence of evidence showing that ship officers had reason to believe that members of the crew deserting on United States territory made the voyage with the intention of so doing, ship owners are not liable to pay the tax on their account (178 Fed. 841). And the Supreme Court of the United States has held in the *Taylor* case (*supra*) that there was nothing in the fact that an alien had been refused leave to land and had been ordered deported to make it impossible as a matter of law for the master of a British ship subsequently to accept him as a sailor on the high seas, even if bound for an American port. At the same time it might well be that the master should be held to a more strict standard of caution in such cases in permitting such an alien all the freedom of ordinary shore leave.

Aliens entering Guam, Porto Rico or Hawaii, are exempt from payment of the tax at these ports; but the Act provides that if they shall later arrive at any port or place of the United States on the North American Continent, the *provisions of Section 1 shall apply.* Rule 2 provides that in such case the "provisions for the levy and collection of the head tax" shall apply. If this means that absence of citizenship subjects the alien to the payment of the head tax irrespective of whether or not he has become a resident of any one of the islands mentioned, it would seem to conflict directly with that provision of the Act which exempts residents of any possession of the United States from the payment of the tax.

By Section 41, accredited officials of foreign governments, their suites, families and guests, do not come within the operation of the Act. The exempting provision was not contained in the preceding Act of March 3, 1903, and there would seem to exist no real necessity for its insertion in the present Act in view of the general effect of the exempting provisions of Section 1, indicating as they do that the head tax is directed only against those aliens who, having given up both residence and domicile in their own country, come to the United

States to establish their home here. That representatives of foreign Powers neither give up their homes in their native land nor seek to establish new homes here is obvious. It is suggested, however, that in inserting so explicit an exempting provision in the present Act, Congress may have had in mind an opinion rendered under the preceding Act, in which the Attorney-General contends that in spite of the exempting provisions in Section 1 of that Act, the head tax should be collected on account of the accredited officials of foreign Powers.

I.

DISABILITIES WHICH OPERATE TO EXCLUDE.

(*a*) *Under the Chinese Exclusion Acts.*

The only basis for exclusion is membership in the Chinese laboring class. All other classes of Chinese are exempt from exclusion. The provisions which require that Chinese persons presenting themselves as members of the exempt classes shall meet the statutory requirements in the way of proof of the fact of their exemption are not directed to the exclusion of the exempted classes as such, but are designed solely to prevent Chinese laborers from entering the United States under the guise of members of those classes. Thus the fact that a Chinese person seeking readmission into the United States on the plea of having been a merchant at the time of his departure from this country is required under the Act of 1893 to prove his prior mercantile status in the United States by two credible white witnesses, is not an attempt to impose restrictions on merchants who seek to reenter, but a precautionary measure against readmitting as a merchant one who is in fact a laborer. It is not because the government is unwilling to readmit a *bona fide* merchant who left the country as a laborer, but because of the practical impossibility on the part of the government to refute evidence of the acquisition of the mercantile status in a country as remote as China, by the Chinese person who left the United States as a laborer. By the Act of September 13, 1888, provision was made for the readmission of Chinese laborers *as such* who at the time of leaving the United States were

legally established as laborers in this country. Without going into details unnecessary for the purpose of this article, it may be said that restrictions imposed by the exclusion Acts upon Chinese persons seeking to establish their right to enter or remain in the United States may be summed up as follows: absolute exclusion of original entry to Chinese of the laboring class; reentry by Chinese laborers under the conditions set out in the Act of September 13, 1888; the assumption of the burden of proof establishing the right to reentry by persons claiming to be Chinese merchants, the quality and nature of the proof being designated by the exclusion Acts; the presentation of the certificate from the Chinese Government designating the applicant as a member of the nonexempt classes, the facts stated in such certificate being subject to refutation at any time by the departmental authorities; and the assumption of the burden of proof under the Acts in force to establish the right to remain on the part of Chinese persons already in this country.

(*b*) *Under the Immigration Act.*

Under the Immigration Act, the excluding provisions are, generally speaking, framed to prevent the moral or physical deterioration on the part of our citizens, singly or *en masse,* as a result of contact with aliens whose presence here would be likely to bring about this result; and to protect and maintain the standard of contract labor in this country. Hence persons of impaired mind or those suffering from some dangerous or contagious disease; persons liable to become public charges; persons who have been convicted of some illegal act involving moral turpitude, or who admit they have committed such acts; women addicted to a life of shame, or who come to the country for an immoral purpose, and others who are connected therewith or profit thereby; persons whose social practices or customs are so contrary to the public policy of this country as to be abhorrent to our accepted principles of law and morality, such as polygamists; anarchists, and others who believe in the overthrow of governments and the violent disruption of constitutional authority, and whose presence therefore would constitute a standing insult and menace to the state; and finally aliens of the laboring classes whose engagement in labor in

this country under contract would at once lower the price of labor and tend to degrade instead of to maintain the standard of both laborer and labor in the United States — all these classes are absolutely excluded by Congress in the exercise of its sovereign right to exclude any and all aliens where the needs of the nation demand such action.

The immigration Acts in general, and the present Act in particular, apply to *all aliens* who seek to enter the United States. Thus it would seem to follow that not only are Chinese laborers *as Chinese laborers* subject to absolute exclusion under the exclusion Acts, but in addition thereto are subject *as aliens* to every restriction provided by the Immigration Act; and that Chinese of the classes exempted under the exclusion Acts are still, as aliens, subject to the restrictions of the Immigration Act. Thus the Chinese merchant, student, or tourist entering the United States for the first time is not excludable under the exclusion Acts, but if affected by any of the disabilities which bring aliens generally under the Immigration Act, is prohibited from admission, and this in spite of the provision of the present Immigration Act, maintaining the Chinese Exclusion Acts in full force. This provision has been on various occasions interpreted by the federal courts. It has generally and most properly been agreed that it was not the purpose of this provision to exempt Chinese persons from the general operation of the Immigration Act. It has been held nevertheless that the Immigration Act has no application whatsoever to Chinese laborers, as it continues the exclusion Acts in force as to them, intact, and under the exclusion Acts no Chinese laborer is allowed to enter the United States whether or not afflicted with disabilities which exclude aliens generally under the Act of 1907; the argument being that a general provision of the later statute will be deemed to have no application to the subject-matter of a special portion of an earlier statute, which prior statute is specifically kept in force by the later Act. The court held in the special case that a Chinese laborer unlawfully in the United States as the result of surreptitious entry, could not be lawfully deported by the immigration authorities on the ground that he was found to be unlawfully in the United States and thus subject to deportation in accordance with

Section 21 of the Immigration Act. It was decided that any Chinese laborer unlawfully in the United States was here in contravention of the Exclusion Act which excludes such persons irrespective of surreptitious or open entry, or any other mental, moral or physical defect, and that as the Exclusion Act was specifically kept in force by Section 43, it should be deemed to apply. It would seem, however, that in arriving at this conclusion the court overlooked the provision of Section 21 of the Act of 1907, which provides for the deportation of any alien within three years after landing in this country, when the Secretary of Commerce and Labor shall be satisfied that the alien is subject to deportation "under the provisions of this Act or of any law of the United States." The practical question arising in connection with this subject is that of the procedure which the Chinese person can invoke by which his right to remain in the United States is to be determined. If the exclusion Acts govern in such cases the Chinaman found unlawfully in the United States has the right to be tried before a United States Commissioner with a right of appeal to the United States court of the district; whereas, if his right to remain is to be determined under the Immigration Act, he must prove the same to the satisfaction of the Secretary of Commerce and Labor, and may be left without the recourse of an appeal to a judicial determination of his case.

(*c*) *The rights of returning resident aliens under the Act.*

One of the most interesting questions which has arisen in connection with the rights of aliens to enter under the Immigration Act is whether or not the fact that an alien who has lawfully entered the United States, lawfully maintained his domicile here, and who later returns to his country or goes abroad for a visit, comes on his return within the operation of the Immigration Act, as is the case of any alien entering the United States for the first time. Up to the passage of the Act of May 3, 1903, the immigration Acts had been uniformly held by the courts only to apply to immigrants, that is to say, to aliens coming to the United States for the first time with the intent of abandoning their old domicile and acquiring a new one in the United States. The courts had up to this time looked upon the Acts

rather in the nature of immigration Acts in the true sense of the word, than Acts whose primary purpose was the exclusion of undesirable aliens as aliens rather than as immigrants. But the Act of March 3, 1903, contains in sections corresponding more or less to the respective sections of the previous Act certain changes, notably the change of the term "alien immigrants" to "aliens." This change in particular was immediately brought to the attention of the courts in judicial proceedings, and it was claimed that it was most significant, and that the intention of Congress in making the change was to make the excluding provision of the Act applicable not only to immigrants, but to all aliens, including those who had established their domicile in the United States. This view was accepted by a number of the circuit and district judges and repudiated by others. In the case of *Taylor* v. *United States* (*supra*) the substitution of the word "aliens" for "immigrants" was adverted to by the court in its decision, and the court stated in the course of that decision that "we can see no reason to suppose that the omission meant more than to avoid the suggestion that no one was within the Act who did not come here with intent to remain." Further, the court held in this case that the word "alien" as used in the Act of 1903 did not include all aliens. There is no room here for detailed discussion as to what was meant by this change. At all events it can be deemed to be of but small importance at present in view of the fact that in Section 25 of the present Act the term "aliens" as it existed in the corresponding section of the Act of 1903, was deliberately set aside by Congress and the word "immigrants" substituted therefor.

The broad question is simply stated: Does the fact of prior lawful residence by an alien in the United States relieve him from the further operation of the Act? Admitting the fact of lawful entry into the United States, the only condition as to admission imposed by the Act, the question of whether or not the alien may retain his rights of residence free from interference by departmental officers, would seem to depend first on whether under the Immigration Act conditions are imposed upon the retention of those rights, and second whether the conditions have been fulfilled by the alien. Under Section 21 of the Act the Secretary of Commerce and Labor is empowered

to deport to the country whence he came any alien who within the three years of his entry into the United States is found to the satisfaction of the Secretary of Commerce and Labor to be unlawfully in the United States. Admitting that the original entry is lawful, the only way in which the alien can be found to be unlawfully in the United States must be by virtue of something which he has done subsequent to his lawful entry which makes his presence unlawful. The test of the jurisdiction of the Act is, then, whether or not it provides that certain acts done even after lawful entry shall be good cause for deportation. The Act of March 26, 1910, amending Section 3 of the Act of February 20, 1907, specifically provides that any alien who shall be found an inmate of, or connected with the management of, a house of prostitution, or practicing prostitution, or who, generally speaking, is found to be in any way connected with or maintained by, or a frequenter of, resorts of prostitution *at any time* after entering the United States, shall be deported in the manner provided by the Act. And this irrespective of whether the entry was unlawful or lawful. But this is the only provision existing in the Act purporting to limit or restrict, in the exercise of his or her domiciliary rights, an alien who has lawfully entered the United States.[1] As before stated, an alien coming to the United States is bound to accept those restrictions which the municipal law imposes with regard to his admission or residence here; on the other hand, the state is bound under international law to grant the alien all the rights and privileges over and above the restrictions imposed which the citizens of this country enjoy. One of the most important rights incident to domicile lawfully acquired is the right to retain the same, and this necessarily includes the capacity to leave and return to it at will. By the amendatory Act of March 26, 1910, Congress has provided restrictions upon the exercise of this right in the case of one

[1] Except, perhaps that provision of Section 20, which provides for the deportation within three years after landing of any alien who within that time shall have become a public charge through causes existing at the time he entered the United States. And this appears to be on the theory that the original entry was not lawful — C. L. B.

class of aliens only; as to all others the municipal law in the shape of the Immigration Act appears to have imposed no restrictions whatsoever, the right to acquire the domicile having vested on the fulfillment of the one condition of lawful entry.

II.

RIGHT OF ALIENS TO INVOKE THE CONSTITUTIONAL GUARANTEES.

In this connection it may be said at the outset with regard to Chinese laborers as well as all other aliens residing in the United States, that as long as they are within the jurisdiction of this country they are entitled to the safeguards of the Constitution in regard to their rights of person and property and to their civil and criminal responsibility (*Yick Wo* v. *Hopkins; Fong Yue Ting* v. *United States*), and can not be deprived of life, liberty or property without due process of law, or of the right to a jury trial in the cases where that right is guaranteed and which the constitutional provisions were intended to cover. Nor because a person within the jurisdiction of the United States is an alien belonging to a class which, under international law and the Constitution, the state may expel at its pleasure, would the state be justified in disregarding *in the proper case* that principle of right and justice universally accepted in this country which throws the burden of proof in criminal cases on the state. The courts have steadily held, however, that the constitutional guarantees of right to trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application to deportation cases, as the latter are in no way criminal trials involving the infliction of a penalty if the person before the adjudicating authority is found unlawfully in the United States. They constitute but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which this government is determined that his continuing to reside here shall depend. (*Fong Yue Ting.*) In other words, that while the constitutional guarantees in question may be invoked by the alien under circumstances under which they were at the time of their adoption

intended to be operative, they can not be successfully invoked under conditions entirely different giving rise to exigencies which they were not designed to meet. Thus the Supreme Court in the *Fong Yue Ting* case (*supra*) asserted the constitutionality of the Chinese Exclusion Act of May 6, 1892, and under it directed the deportation of a Chinese laborer who was arrested without process, was heard before a United States judge without a jury on the question of his right to remain in the United States, and on failure to prove that right was ordered deported by the district judge. The effect of this decision was to settle conclusively that the constitutional guarantee of the right to a jury trial did not apply to a judicial hearing to determine the right of an alien to remain in the United States, that deportation under such conditions was not a punishment, and therefore that the provision against cruel and unusual punishments had no application, and finally that the principle that the burden of proof lies with the state in criminal cases has no application to deportation proceedings, as they do not constitute a trial, and do not contain room for a finding involving a criminal charge.

If these guarantees can not be invoked by aliens resident in the United States arrested in deportation proceedings it follows, *a fortiori,* that the alien stopped at the border and detained in his attempt to enter this country has still less reason to attempt to rely upon them. In the case of *Turner* v. *Williams* an alien attempting to enter was arrested and held for deportation under the Act of March 3, 1903, which prohibited the entrance into this country of alien anarchists. The Act was attacked on the ground that it violated the First Amendment whereby it is provided that Congress shall make no law abridging the freedom of speech. After stating that none of the guarantees of the Amendment respecting freedom of worship, speech, or petition was violated by the Act, the court remarked that an alien

does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by the supreme law, and as, under it, the power to exclude has been

determined to exist, those who are excluded can not assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

The right of the entering alien to invoke the Fifth Amendment.

As before stated, the reason of the inapplicability of the First and Sixth Amendments and particularly the sixth to the case of aliens invoking the same in deportation proceedings, appears to be the fact that the conditions under which the protection of the guarantees therein contained are generally sought are not those to which the constitutional provisions in question were intended to apply. While the question as to whether the alien seeking admission to the United States is in a position to specifically invoke the broad guarantee of due process of law as expressed in the Fifth Amendment has been referred to by the Supreme Court as one involving possibly some doubt (*Yamataya* v. *Fisher*), that court has never held that that constitutional provision is beyond the reach of the entering alien who seeks to invoke it. The question of due process has arisen mainly in connection with whether arrest and denial of entry and detention for deportation as a purely administrative proceeding constitute due process of law. The courts have invariably held that Congress has the power not only to intrust administrative officers with the handling of all matters arising in the execution of the laws relating to the admission or exclusion of aliens, but can make their decisions as to the right of aliens to land final and conclusive on the courts (*Ekiu* v. *United States*). To that extent, then, the alien can not claim that he is held for deportation without due process of law, for it is the administrative proceeding carried out in accordance with the provisions of the Act authorizing it which constitutes due process. On the other hand, the courts have never held that, in cases where departmental officers have exceeded their jurisdiction or have acted arbitrarily or unjustly, or have denied the alien a fair hearing, recourse to a judicial determination of his rights may not be had on the ground that he was being held for deportation without due process of law.

III.

RESTRICTIONS ON ALIENS AS TO CHOICE OF FORUM IN DEPORTATION PROCEEDINGS.

From a very early period in the history of the Exclusion and Immigration Acts the question of the right of the alien to enter and remain in the United States has been intrusted to departmental officers. By the statutes in force the action of such officers charged with the duty of enforcing those Acts could be reached and controlled by the courts when necessary for the protection of the rights given and secured by some statute or treaty relating to aliens. On August 18, 1894, Congress passed the Sundry Civil Appropriation Act. Under this Act $100,000 was appropriated under the item entitled "Enforcement of alien contract labor laws," and $50,000 under the item entitled "Enforcement of the Chinese Exclusion Act," immediately following the former. The latter item concludes with the following paragraph:

In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury.

By the Act of February 14, 1903, the jurisdiction of the Treasury Department in these matters was transferred to the Department of Commerce and Labor. Thus in the *Lem Moon Sing* case, where a Chinese person sought readmission into the United States on the ground that he was a merchant, and was entitled under the Exclusion Acts to return to his commercial domicile in the United States, the court held that by virtue of the passage of the Act of August 18, 1894, in his absence, the denial of the right to enter by the Secretary of the Treasury was absolutely final on the question of that right, and consequently refused the relief sought by the petitioner in *habeas corpus* proceedings. And in spite of determined attacks made upon the Act in the courts, it was held constitutional on on the old ground that Congress could intrust either the judicial or executive departments with the determination of the right of aliens

to land or remain in the United States, that it had expressed its will in this instance, and had made the decision of the Secretary of the Treasury the final expression of the governmental intent in these cases.

But the most serious controversy to arise in connection with the Act of 1894 was with regard to the jurisdiction of executive officers over cases where the right to entry was based on the allegation of citizenship by the party seeking admission into this country. It was contended that, granting that under the Act the appropriate executive officers might have full power to pass finally on the cases of *aliens,* the question of citizenship once asserted went to the jurisdiction of the executive branch, and the matter must necessarily be referred to the courts. This question had already been raised under the Chinese Exclusion Act of 1892. Under that Act a Chinese person found by the inspector of internal revenue to be in the United States without a certificate of residence had the right to a hearing before a United States commissioner to prove his right to remain. In the case of *Chin Bak Khan* (186 U. S. 193, 46 Law ed. 1191) the claim was that the commissioner had no jurisdiction because the basis of the right to remain was alleged to be the American citizenship of the party arrested, and that by law the "obligation to prove the right to remain before the commissioner rested on Chinese persons only." But the court held that the right on which such a claim is vested must be made to appear, and that "the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed." But further, the court laid particular stress on the fact that the United States commissioner is a *quasi* judicial officer and acts judicially in these hearings.

In the case of *Gonzales* v. *Williams* (192 U. S. 142, Law Ed. 317) the petitioner, an unmarried woman, a native of Porto Rico, residing there on April 11, 1899, the date of the ratification of the Treaty of Paris, when Porto Rico was ceded to the United States by Spain, on seeking admission into the United States, was refused entry on the ground that she was an alien, and subject to exclusion under the

Immigration Act of March 3, 1891. The government contended that by virtue of the provisions of that Act and the Act of August 18, 1894, the decision of the departmental officers was final. The government further contended that not having found her to be a citizen of the United States, she must necessarily be an alien, and therefore came within the departmental jurisdiction. But the court held that the question in the case was not whether she was a citizen of the United States, but whether she was an alien within the intent of the immigration statute, and that the courts were not bound by the decision of the executive officers, thus denying the application of the Act of August 18, 1894. Later in the case of *Turner* v. *Williams* (194 U. S. 279; 48 Law ed. 979) the court, in referring to this case, stated that "the question was whether a citizen of Porto Rico * * * came within the Immigration Act * * * which, being decided in the negative, all questions of fact became immaterial."

In the case of *United States* v. *Sing Tuck* (194 U. S. 161; 48 Law Ed. 917) certain Chinamen seeking admission into the United States, when questioned as to their right to enter, alleged that they were born in the United States, and then stood mute. They were denied admission by the immigration officers, and, without taking their appeal to the Secretary of Commerce and Labor, sought relief in *habeas corpus* on the ground that they were American citizens and that the department was without jurisdiction in their case. The writs were refused on the ground that the relief was sought prematurely in that, not having taken advantage of their right of appeal, they had turned to the courts for assistance. But in the *Ju Toy* case the question of whether or not the allegation of American citizenship on the part of Chinese persons refused admission to the United States by the immigration authorities and again denied the right to enter on appeal to the Secretary of Commerce and Labor sufficed to take the case from the hands of the departmental officers and into the jurisdiction of the courts, was squarely raised. The case of the petitioner appeared to be peculiarly strengthened through the fact that the United States district court had granted the writ, and, on hearing the evidence adduced, found

the petitioner to be a native-born citizen of the United States. But the Supreme Court held that the writ should not issue on the mere allegation of citizenship, and that the only ground on which the courts could interfere under the Act of 1894 was that of failure on the part of executive officers to grant the petitioner a fair hearing.

What is the result of these decisions as to the finality of the departmental fiat in these cases?

It is well settled that as an abstract legal proposition, departmental officers have no jurisdiction to exclude or deport citizens of the United States, and the department does not claim this right. Nevertheless it is held that the Secretary of Commerce and Labor is authorized under the Act of 1894 and the various pertinent provisions of the present Act to detain persons who may be citizens for the purpose of passing on the facts on which the claim of citizenship is based. The principle is thus established that the Department of Commerce and Labor is the forum, and the only forum, in which the fact of citizenship can be proven in deportation proceedings by any person seeking to enter the United States, provided that the applicant obtains a fair hearing. This statement is subject to the reservation that the departmental decision is final only in so far as it constitutes a finding of fact. Thus in the case of *Wong Kim Ark* v. *United States* it was admitted both by the government and the applicant that the latter, a person of Chinese descent, was born in the United States. The only issue was the question of law as to whether or not his birth vested him with citizenship, and the court held that it did. But suppose the department had held that the applicant was an alien and not entitled to admission, would the departmental decision have been final? This question would seem to be answered by the *Gonzales* case (*supra*) in which the court assumed jurisdiction on the ground that, taking as admitted the facts found by the executive officer, his conception of the legal effect of the status of the applicant based on those facts was incorrect. But there is nothing in the decision indicating that the court felt that the department had not jurisdiction to pass on the facts from which the alien's supposed legal status was — and as it turned out mistakenly — deduced.

Does the *Ju Toy* decision conflict with this principle? In the *Wong Kim Ark* and *Gonzales* cases the appeal to the courts did not involve a determination of the status of the petitioners but merely a legal interpretation thereof; whereas in the *Ju Toy* case the object of the appeal was the determination of a status already administratively determined on which the right to enter was predicated, and which necessarily involved an examination of the facts on which the executive officers had already passed. The general result of these cases, taken collectively, seems to be that the *status* of the alien seeking admission into the United States is a question of fact as to which the decision of the Secretary of Commerce and Labor is final; but that the *legal effect of the status* is a qustion of law as to which departmental decisions are not binding on the courts.

It is said in the dissenting opinion rendered in the *Ju Toy* case that under that decision citizens of the United States may be banished from this country without a judicial hearing; if so, practically all that can be said in defense of this extraordinary condition of the law is that the case is not likely to arise. The right to a judicial hearing would not necessarily preclude this contingency. It is hard to conceive how it could occur in the case of native Americans or in that of such aliens as have become citizens in accordance with our naturalization laws, full record of which would almost necessarily be of comparatively easy access in any case. Persons of Chinese descent born in the United States may be said to be the only class of citizens on any one of whom such a misfortune might fall. But it would be likely to occur only in case of their departure for China without having availed themselves of the ample and easy opportunities for identifying themselves as American citizens afforded by that rule of the department entitling each and every person of Chinese descent lawfully in the United States to a pre-investigation fixing his status prior to a temporary departure from this country. He is granted a fair and unbiased hearing under the law, and as to him a decision of the Secretary of Commerce and Labor is final only as to the status of the applicant as developed by the facts on which the right to reënter is based, and not as to the legal effects of the status revealed by the facts proven. If these conditions are

lacking he has full recourse to a judicial determination of his rights; but his chief protection lies and will continue to lie, in the vast majority of cases, in the fact that those executive officers with whom Congress has in its wisdom intrusted the final determination of his rights, will pass upon them with an open and an upright mind.

The CHAIRMAN. The papers that have been read are now open for discussion, if there is anyone who desires to be heard. (After a pause.) Apparently there is no discussion to be had, and we will therefore adjourn until 8 o'clock this evening.

RECEPTION BY THE PRESIDENT OF THE UNITED STATES.

At 2.45 o'clock p. m., Friday, April 28, 1911, the members of the Society were received by the President of the United States in the East Room of the White House. The President of the Society, the Honorable Elihu Root, presented the members to President Taft, who made some happy remarks of welcome appropriate of the occasion and showing his interest in the Society and its objects.

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL.

FRIDAY, APRIL 28, 1911, AT 4 O'CLOCK P. M.

The Executive Council convened in the Red Room of the New Willard Hotel.

Present: Mr. Chandler P. Anderson, Mr. Chas. Henry Butler, Gen. John W. Foster, Judge George Gray, Prof. Charles Noble Gregory, Mr. Robert Lansing, Hon. Frank C. Partridge, Mr. Jackson H. Ralston, Dr. James Brown Scott, Admiral Chas. H. Stockton, Mr. Chas. B. Warren, Prof. Geo. G. Wilson, Prof. Theo. S. Woolsey.

In the absence of the President, the Chairman of the Executive Committee, Gen. John W. Foster, presided.